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"REFUSED"; "PLAINLY RIGHT."

The law relating to appeals and writs of error should be amended so that the litigants in the State courts could appeal to the State Supreme Court as a matter of right without regard to the amount in controversy. The statute already gives this privilege to any aggrieved party where the controversy is concerning the title or boundaries of land, the condemnation of property, the probate of a will, the appointment or qualification of a personal representative, guardian, committee, or curator, or concerning a mill, roadway, ferry, wharf or landing, or the right of the state, county or municipal corporation to levy tolls or taxes, or involving the construction of any statute, ordinance, or county proceeding imposing taxes, or any final order of the State Corporation Commission, irrespective of the amount involved.[1] But even this right is limited so that in all cases "If the court or Judge to whom the petition is presented, shall deem the judgment, order or decree PLAINLY RIGHT and reject the petition on that ground, and *the order so states,* no other petition therein shall afterwards be entertained." [2] The court should not have any such power. A great many petitions for appeals and writs of error are denied on this statutory ground and in the exact language of the statute. To show the unsoundness, as a matter of justice, of this method of destroying the appellant's case, it is only necessary to call attention to the result in those cases in which, at first blush, the court is not prepared to say that what the lower court has done is "plainly right," and allows the appeal. If the method is sound, every appeal and every writ of error thus granted should result in a reversal. An examination of the reports shows that supposition is not well founded as very few are reversed. However, in those cases which have been refused because in the first instance, after simply looking over the petition, the court thinks they are "plainly right," whatever might have been the result if the court had heard *argument,* no one can ever know, because this action forever ends the controversy. The litigant has spent his money on

1. Code of Va. (1904), § 3454.
2. Code of Va., § 3466.

the gamble that he might get a *hearing* with this confusing result and serious loss. "Plainly right" doubtless means in conformity with truth or fact; correct, not erroneous. The lawyer who brought the suit knows more than any one else about the case, and when he applies for an appeal or writ of error he does so because the decision of the lower court appears to him to be "plainly wrong." He is bound to be conscientious about this as his reputation and clients' money are involved in his opinion and action. His views are primarily entitled to more weight than any judge who simply reads the petition it does not make any difference how able or conscientious the judge may be. The present method is unscientific and it fails to give satisfaction to either the litigants or their lawyers.

An appeal to the United States Supreme Court in a proper case is a matter of right, and its allowance is in realty nothing more than the doing of those things which are necessary to give the appellant the means of invoking the jurisdiction. A writ of error is the process of the Supreme Court, and it is issued therefore only upon its authority, but an appeal can be taken without any action by such court. All that need be done to get an appeal is for the appellant to cite his adversary in the proper way before the Supreme Court, and for him to docket the case at the proper time. Such a citation as is required may be signed by a Judge of the court from which the appeal is taken, or by a justice of the Supreme Court. This is equally true of writs of error, and it applies to all appellate proceedings in the Federal Courts.[3] Not only is this easy method of procedure provided for the Federal courts but the poor litigants are specially taken care of by the Act of Congress of July 20, 1892, which provides: "That any citizen of the United States entitled to commence or defend any suit or action, civil or criminal, in any court of the United States, may, upon the order of the court, commence and prosecute to the Circuit Court of Appeals, or to the Supreme Court in such suit or action, including all appellate proceedings, unless the trial court shall certify in writing that in the opinion of the court such appeal or writ of error is not taken in good faith, without

3. Brown *v.* McConnell, 124 U. S. 489; 14 Roses Notes on U. S. Rep. 79; 6 Fed. St. Anno. (2nd ed.), p. 164.

being required to prepay fees or costs or for the printing of the records in the appellate court or give security therefor, before or after bringing suit or action, or upon suing out a writ of error or appealing, upon filing in the said court a statement under oath in writing that because of his poverty he is unable to pay the costs of said suit or action or of such writ of error or appeal. or to give security for the same, and that he believes he is entitled to the redress he seeks by such suit or action or writ of error or appeal, setting forth briefly the nature of his alleged cause of action, or appeal." [4]

It thus appears that the attitude of the National Courts is exceedingly friendly to litigants especially those seeking to protect themselves by right of appeal to the higher courts. It was thought at one time that having the Federal Circuit Courts of Appeal made up of judges who in many of the cases have to reverse each other, would not be satisfactory. But the practice causes no trouble whatsoever, nor is there any complaint of those courts. The system works admirably.

Any citizen may have a judgment rendered against him in an action in a state court for $100,000, the record may cover a thousand pages, and to have the clerk copy it for a petition to the Supreme Court to apply for a writ of error may cost the party seeking to have a hearing, $1000, and yet, when it is presented, without argument or consultation with each other, as the law stands at present, the court, or a single judge, can deny him a hearing if the decision on the preliminary inspection of the petition is deemed to be "plainly right." The judgment debtor can go no further but must pay up or take the benefit of the bankrupt act. If wealthy, in spite of war taxes, he can go on, of course, and stand the loss. But this is not true of a very poor litigant. If the petitioner is a widow suing for the death of a child, or a son, her main support, where the court or judge says what the lower court did was "plainly right" and signs his name on the back of the petition under the word "Refused," this ends the case. The whole scheme is wrong for it puts the judge in an attitude of hostility to the appellant. It makes him look for

4. 2 Fed. St. Anno. (2nd ed.), p. 647

flaws in his case rather than view the appeal as one addressed to his sense of right and justice.

It may be remarked in passing that the decisions of our Court of Appeals are not always themselves "plainly right." Eubank, a citizen of Richmond, Va., owned a lot on Church Hill in that city, and desired to erect a dwelling house on it in accordance with plans and specifications approved by the City Building Inspector. After he had assembled his materials but before he could get to work, his neighbors on that side of the square on which his lot was situated, got together and voted under a so-called ordinance, and required him to move his house back to an arbitrary building line, selected by them, before he could proceed further. This, under the advice of his counsel, Eubank declined to do, and appealed to the Board of Public Safety for authority to proceed. That august body denied him any relief, and he was thereupon fined in the Police Court $25.00; from the fine he appealed to the Hustings Court, which affirmed the judgment of the Police Court and from this decision to the Supreme Court of Appeals of Virginia. What the Virginia court of last resort did appears in 110 Va. 749. Eubank then took the case by writ of error as of right to the United States Supreme Court in Washington although it was only a $25 fine, and that court took two days to hear the case, and on December 2, 1912, unanimously decided that Eubank and not the Supreme Court of Appeals of Virginia, was "plainly right," putting the costs on the City of Richmond.[5]

Limiting the right to get a hearing by the Virginia practice finds no support in other jurisdictions nor in the history of appellate procedure. At an early date in civil cases, a writ of error was always regarded as a writ of right and no allowance of the writ by a reviewing court was necessary and this was true also of appeals.[6]

It is more than probable that more than two-thirds of the appeals and writs of error now applied for are disposed of under the statute without a hearing by marking on the wrapper

5. Eubank *v.* City of Richmond, 226 U. S. 137; 57 L. Ed., p. 156; 32 Ann. Cas. 192; 42 L. R. A. (N. S.), 1123.

6. 2 R. C. L. 101, 103.

"Refused" as "plainly right." This method tends to confuse rather than clarify the law. Assuming that the lawyer asking for an appeal knows all the reported cases, when he tries to apply them to the facts and law he goes to the expense of getting a copy of the record and takes the time to draw up his petition under the belief that none of the decided cases cover the points; and when his petition is refused all that he knows is that he has guessed wrong. It may be that he is wrong on the facts; it may equally as well be that he is wrong on the law or the procedure. He is never sure. This failure no lawyer can ever make clear to his disappointed client. The confusion in the law remains just as it was before the petition was denied. Tort actions constitute a large part of the ordinary litigation. At the time the limitations on the right of appeal were incorporated in our code such actions were not common. The first book on torts was published in America in 1859 and the first in England in 1860.[7]

Fortunately for the people of Virginia, the Constitution provides that "after the year 1910 the General Assembly may change the jurisdiction of the Supreme Court in matters merely pecuniary." [8]

The economic development of modern times has made the world as it is and not as the people of the 19th Century saw it. There has been an immense improvement in the way in which people live and in the method of asserting their individual rights but it is least developed in the administration of justice. The idea prevails in some quarters that a little case is of small consequence and therefore it is "plainly right" that the small litigant need not have any right of appeal. The writer emphatically protests against this view. There is no such thing as a small case or a small question to be determined by a judicial tribunal. Every question is a big question if not the biggest ever before the court. It is next to impossible for any man or set of men to say that a question which has been hotly contested has been rightly decided until he HEARS it debated. No man should have the power to extinguish such right by subscribing his name under the word "refused" and adding the words "plainly right."

7. Bishop Non-Cont. Law, p. 2, § 3.
8. Const., § 88.

Patrick Henry got his famous resolution through, in Old St. John's Church, after "bloody" debate, as it was then called, by one vote. The majority was there ready to certify that things as they were, were "plainly right" and should not be disturbed by revolution, and they got together immediately after he left and did that very thing.[9]

After a three years' debate, the French Assembly in 1875 by one majority established the French Republic which has fought and won the greatest war for human liberty known to history.

Daniel Webster said of John Jay, our first chief justice of the United States Supreme Court, "that when the spotless ermine of the judicial robe fell upon him it touched nothing not as spotless as itself." This can well be said of our Supreme Court judges, as every one will freely admit; but the question as to whether even John Jay, or John Marshall, if you prefer, if they were now living, should be given the power to destroy any litigant's right by refusing an appeal or denying a writ of error without a hearing is the matter to be considered. Nothing can better illustrate the importance of oral argument and show the way it seeps in, than the classic instance of its effect as made before the great judge, Lord Lyndhurst, who had the habit of commenting in an undertone, as the case proceeded, on what counsel said, so that the junior judge sitting with him could hear, although the lawyer could not. General Watson, who was so called because he had fought at Waterloo, was making the argument and this is what the junior judge heard Lord Lyndhurst say to himself: "What a d—d fool the man is"—then, after an interval, "Eh, not such a d—d fool as I thought"; and then, another interval, "Egad, it is I that was the d—d fool, as I thought."[10] This great judge without *hearing* Gen. Watson would doubtless never have arrived at such a conclusion. Watson himself was afterwards raised to the Exchequer Bench.

All reforms in Virginia come from the Legislature. Authority for this need not be cited except to say that the Supreme Court of Appeals of Virginia, by direct authority of that body, has had the right to reform the procedure since 1849 but has

9. 11 Chronicles of America, p. 73.

10. The Victorian Chancellors, Vol. 1, p. 83.

not yet done so.[11] There should be appeal as of right in all cases. The logic of the present situation, as stated above, is that the court should reverse in all cases where they grant an appeal or writ of error for if the effect of the denial of the appeal is to destroy the right to reverse because the decision of the lower court is "plainly right" allowance of the appeal should conclusively show that the lower court was "plainly" wrong and should therefore be reversed and the appellant should not be required to run the gauntlet any further.

If members of the Legislature had power to report a bill out of a committee, without argument, by writing their names on the "jacket" in which the bill is wrapped, it would have the same power which is now conferred upon the Court of Appeals by statute. Yet no Legislature would permit a bill to be "jacketed" out of the committee to which it was referred and thus placed upon its calendar.

The present writer is opposed to requiring the court to state its reasons for refusing to grant appeals; they seem to have difficulty enough in doing this even after argument. But all appeals should be of right. The judge is now furnished with a stenographer, and he can doubtless have a dictaphone, if he desires it, and there is no possible reason why he cannot keep up with the business of the court. At any rate no court should have the power to cut down its work by refusing appeals and denying writs of error. We are all too human for that. When a litigant employs a lawyer, copies and pays for the record, he should not thereafter be denied his rights as he sees them with nothing to look at but the words "refused," "plainly right" because they mean nothing to him nor to his lawyer. No lawyer nor judge should be put in such a position. It hurts the judge as a judge for it smacks of irresponsible power.

As matters now stand in Virginia, no litigant can appeal or get a writ of error in cases where the amount is under $300 and in cases where the amount is in excess of $300 he cannot get an appeal or writ of error except by permission of a judge or the court. But he can spend hundreds of dollars in the preparation

11. Code of 1849, p. 625; Code of Va. (1904), § 3112; Acts 1916, page 939.

of the record and the petition and then present it to the court and have the matter ended by having the words "refused" "plainly right" written on the jacket and signed by the judges. If the judges need more pay they should have it; if they need more assistance they should have it; but the right to refuse appeals should be taken away from them because no mortal court should possess any such autocratic power. The constitution of the Commonwealth requires them to give reasons for their decision, that is to say, file their opinions with the records in each case decided by them. But out of this side door, many litigants are turned who never know any more than that they have been denied a hearing, and their appeal "refused" because the decision of the lower court was "plainly right." The idea that the court would be overwhelmed with work because a number of petty appeals would be taken is simply preposterous. The minimum fee charged by counsel for taking a case to the Supreme Court is $100. No ordinary litigant would give the matter a single thought where the sum involved was small. He could not afford to do so. But if he did, why not hear him? His rights mean as much to him as the litigant whose claim is larger. The present system certainly does not give satisfaction to either lawyers or litigants and it should not be tolerated by a free people. It would elevate the tone of the Bench as well as the Bar if all parties knew that they had an appeal as of right in all cases to the highest tribunal in the Commonwealth. The Legislature has the power to cure this evil and it should be done at the next session so that it may take effect when the new Code goes into operation in January 1920. Let us get rid forever of the euphemism of saying, without hearing argument, "refused" "plainly right" and thus winding up a case in such a bewildering judicial fog.

S. S. P. PATTERSON.

Richmond, Va.
Sept. 20, 1919.